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No. 94-1807

In the Supreme Court of the United States

OCTOBER TERM, 1994

MCCLELLAN ECOLOGICAL SEEPAGE SITUATION, MARY FISHER, AND CHARLES YARBROUGH, PETITIONERS

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9613(h), deprives federal courts of jurisdiction over an environmental citizen suit that challenges ongoing government cleanup activities at a CERCLA site.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 47 F.3d 325. The October 28, 1993, order of the district court (Pet. App. 169-196) is unreported. The district court has resolved other matters in this case through opinions reported at 655 F. Supp. 601 (Pet. App. 20-28), 707 F. Supp. 1182 (Pet. App. 29-82), and 763 F. Supp. 431 (Pet. App. 83-118), and through two unreported opinions (Pet. App. 119-155, 156-165).

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The petition for a writ of certiorari

was filed on May 1, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision dismissing their claims that the Department of Defense has violated the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, in responding to hazards at inactive waste sites at the McClellan Air Force Base in Sacramento, California. The government is currently conducting a cleanup of those waste sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.* The court of appeals ruled that Section 113(h) of CERCLA, 42 U.S.C. 9613(h), deprived the district court of jurisdiction to entertain petitioners' claims challenging the ongoing CERCLA cleanup.

1. Since its establishment in 1936, McClellan Air Force Base (McClellan) has primarily served as an aircraft maintenance and repair depot. McClellan used toxic and hazardous materials in its operations and consequently generated toxic and hazardous waste. McClellan disposed of most of the waste through burial in earthen pits on the Base, but it phased out and ceased that practice by the late 1970s. In 1979, McClellan voluntarily initiated an investigation to study those past disposal practices and associated groundwater contamination. In 1980, McClellan began implementing a cleanup program under Section 104 of CERCLA, 42 U.S.C. 9604 (1988

& Supp. V 1993), and Executive Order No. 12,316, 3 C.F.R. 168 (1981 Comp.). See Pet. App. 7-8.[1]

Congress amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, which included detailed provisions respecting government cleanups at federal facilities. See CERCLA § 120, 42 U.S.C. 9620. The Environmental Protection Agency (EPA) listed McClellan on the National Priority List (NPL), which identifies the Nation's most serious hazardous waste sites. See CERCLA § 105, 42 U.S.C. 9605 (1988 & Supp. V 1993); 40 C.F.R. Pt. 300, App. B; 52 Fed. Reg. 27,620, 27,641 (1987). At the same time, the cleanup process at McClellan was reshaped to conform to the requirements of Section 120 of CERCLA. Pet. App. 8.[2]

EPA, the Air Force, and the State of California entered into an Interagency Agreement pursuant to Section 120(e)(2) of CERCLA to accomplish a unified and complete cleanup of contamination at McClellan. The parties signed the agreement on July 21, 1989,

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[1] Congress has empowered the President to administer CERCLA and to delegate his response authority to subordinate officials. See CERCLA § 115, 42 U.S.C. 9615 (1988 & Supp. V 1993). The President has authorized the Secretary of Defense to select removal or remedial actions at Department of Defense facilities. Exec. Order No. 12,316, § 2(c), 3 C.F.R. 170 (1981 Comp.). Until 1986, the Department of Defense satisfied its CERCLA duties and conducted its Section 104 remedial activities under a program known as the Installation Restoration Program.

[2] After Congress amended CERCLA in 1986, the President directed the Secretary of Defense to exercise response authority consistent with CERCLA's amended provisions. See Exec. Order No. 12,580, § 2(d), 3 C.F.R. 195 (1987 Comp.).

and it became effective on May 2, 1990. The Agreement establishes a process for investigation of site hazards, assessment of remedial alternatives, and remediation of contamination at the Base. The Agreement requires McClellan to incorporate all applicable legislative requirements into its cleanup through a Management Action Plan. Pet. App. 8.

The Plan divides the site into 11 operable units (OUs), ranks the OUs in order of cleanup priority, and sets milestones for accomplishing remedial investigations, feasibility studies, and cleanup activities. Groundwater remediation plays a central role in the response action. The groundwater beneath the Base is extracted and cleansed through a treatment plant that became operational in 1987. Numerous other response and remedial actions addressing soil contamination and other hazards have been implemented or are planned. See Pet. App. 8, 175-179.

The Interagency Agreement specifies that the activities covered by the Agreement will satisfy CERCLA, RCRA, CWA, and applicable state laws and regulations apart from the environmental permitting regimes that govern non-CERCLA activities. Section 17 of the Agreement, entitled "Statutory Compliance/RCRA-CERCLA Integration," integrates the Air Force's CERCLA response obligations and RCRA requirements. Section 19 of the Agreement additionally states:

> The Parties recognize that under section 121(d) and 121(e)(1) of CERCLA/SARA, 42 U.S.C. § 9621(d) and 9621(e)(1), and the [National Contingency Plan], portions of the response actions called for by this Agreement and conducted

> entirely on-site are exempted from the procedural requirement to obtain a federal, State, or local permit but must satisfy all the applicable or relevant and appropriate federal and State standards, requirements, criteria, or limitations which would have been included in any such permit.

The Agreement also specifies a dispute resolution mechanism to resolve disagreements among the signatories. Pet. App. 179-181.

2. In 1986, petitioners brought this action against the Secretary of Defense, alleging violations of the CWA, RCRA, and related state laws. In relevant part, petitioners sought to subject the inactive McClellan waste sites, which are currently being addressed through Section 120 of CERCLA and the Interagency Agreement, to RCRA's reporting and permitting requirements and to the CWA's permitting requirements. In a series of opinions, the district court ruled against petitioners on the merits of their claims. Pet. App. 20-28; *id.* at 29-82; *id.* at 83-118; *id.* at 119-155; *id.* at 156-165.

Petitioners appealed. After hearing oral argument, the court of appeals remanded the case to the district court to augment the record with respect to the progress and scope of the CERCLA cleanup at McClellan and to decide whether the district court's jurisdiction over petitioners' claims was barred by Section 113(h) of CERCLA. Pet. App. 166-168. Section 113(h) provides in pertinent part as follows:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) * * * to review any challenges to removal or remedial action selected under section 9604 of

> this title * * * in any action except [certain prescribed CERCLA proceedings].

42 U.S.C. 9613(h).

On remand, the district court concluded that petitioners' claims directed at sites undergoing cleanup activities constituted challenges to CERCLA remedial and removal actions and were therefore barred by Section 113(h). Pet. App. 169-196. The court specifically ruled that "a comprehensive CERCLA cleanup is presently underway at [McClellan]," that petitioners' "claims for relief under RCRA and the CWA with respect to contamination sites now undergoing cleanup represent challenges to such removal and remedial cleanup activities," and that "the court accordingly lacks jurisdiction over such claims." *Id.* at 195.

The court of appeals agreed with the district court's analysis. Pet. App. 1-20. The court rejected petitioners' contention that Section 113(h) of CERCLA is limited to claims alleging violation of CERCLA, ruling that Section 113(h) withholds federal jurisdiction to review any claims, including those under other statutes, that are found to constitute "challenges" to ongoing CERCLA cleanup actions. Pet. App. 10-11. The court of appeals concluded that all of petitioners' claims for relief connected with McClellan's inactive sites were challenges to the CERCLA cleanup because petitioners sought "to improve on the CERCLA cleanup as embodied in the Interagency Agreement" and because the injunctive and declaratory relief sought by petitioners would interfere with that cleanup. *Id.* at 14-15.

ARGUMENT

Section 113(h) of CERCLA, 42 U.S.C. 9613(h), imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA response actions. That Section provides that no federal court shall have jurisdiction to review "any challenges to removal or remedial action" selected under CERCLA except through five specific avenues, none of which is involved in this case. The court of appeals properly concluded that Section 113(h) bars petitioners' claims under the CWA and RCRA, because those claims pose "challenges to removal or remedial action" selected under CERCLA for the cleanup of inactive waste sites at McClellan. That ruling does not warrant further review.

1. CERCLA provides a specific framework for cleaning up hazardous wastes at federal facilities and for incorporating existing environmental standards in the remedy selection process. See CERCLA § 120, 42 U.S.C. 9620 (1988 & Supp. V 1993). It also limits judicial challenges to ongoing CERCLA cleanups that would interfere or overlap with the remedial activities. The CERCLA provision that accomplishes that result, Section 113(h), generally postpones judicial involvement until the cleanup has been completed. See CERCLA § 113(h)(4), 42 U.S.C. 9613(h)(4) (allowing a citizen suit once the response action has been "taken" or "secured"). It thereby ensures that an authorized cleanup can be completed without protracted litigation. See Pet. App. 10-11, 186-189; accord *Arkansas Peace Center* v. *Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1218 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994); *North Shore Gas Co.* v. *EPA*, 930 F.2d 1239,

1244 (7th Cir. 1991); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1018-1023 (3d Cir. 1991); *Schalk* v. *Reilly*, 900 F.2d 1091, 1095-1097 (7th Cir.), cert. denied *sub nom. Frey* v. *Reilly*, 498 U.S. 981 (1990).

Petitioners object to the court of appeals' interpretation of Section 113(h) as a "blunt withdrawal of federal jurisdiction." Pet. App. 10. They argue that the court's application of that provision would "preempt" or "repeal" other environmental laws. Pet. 16-17. Petitioners overlook that CERCLA incorporates existing federal and state environmental standards in cleanup plans. See, *e.g.*, CERCLA §§ 120-121, 42 U.S.C 9620-9621 (1988 & Supp. V 1993). As the court of appeals explained (Pet. App. 12), the Interagency Agreement in this case provides the CERCLA mechanism for enforcing substantive requirements under the CWA and RCRA. That Agreement requires McClellan to comply with the substantive standards and prescribes a process for the governing regulatory authorities—EPA and the State of California—to coordinate compliance. Hence, Section 113(h)'s limitation on judicial jurisdiction does not preempt or repeal the CWA or RCRA standards; it restricts only *judicial* involvement at CERCLA sites.

Petitioners argue (Pet. 19-20) that if Congress had intended to limit judicial challenges under the CWA and RCRA pending completion of CERCLA remedial action, Congress would have said so in the CWA or RCRA. But Congress intended to insulate ongoing CERCLA cleanups not only from CWA and RCRA suits, but from other legal challenges. It therefore expressed that intent in CERCLA itself. Petitioners also suggest (Pet. 21-24) that Section 113(h) should apply only to potentially responsible parties. But

Section 113(h) makes no distinction between responsible parties and citizen group plaintiffs. See 42 U.S.C. 9613(h). CERCLA's legislative history confirms that Section 113(h) applies to all persons and all challenges.[3]

Petitioners err in contending (Pet. 24-27) that the court of appeals' decision is contrary to EPA's understanding of CERCLA. The EPA sources that petitioners cite (Pet. 25-26) do not state that a citizen suit seeking RCRA compliance may proceed without regard to Section 113(h) at federal facility sites that are undergoing a CERCLA cleanup. Those sources indicate, instead, that potential overlap between RCRA and CERCLA at a federal facility should be resolved through the Interagency Agreement for the facility. See, *e.g.*, 55 Fed. Reg. 8698 (1990); Pet. App. 201-202. In this instance, the Interagency Agreement specifically addresses the integration of RCRA and CERCLA and dispenses with the need for RCRA permits at inactive CERCLA sites. See pp. 4-5, *supra*.[4]

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[3] See, *e.g.*, 132 Cong. Rec. 28,410-28,411 (1986) (Sen. Thurmond); *id.* at 29,735-29,736 (Rep. Glickman); *id.* at 29,735 (Rep. Lent); *Schalk*, 900 F.2d at 1096; *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.), cert. denied, 493 U.S. 991 (1989).

[4] Petitioners' reliance (Pet. 26) on an EPA memorandum to the Department of Energy (Pet. App. 197-206) is misplaced. That memorandum addressed the specific situation in which a federal facility included a number of RCRA-permitted units that had received hazardous waste after the effective date for RCRA permit and notice compliance. *Id.* at 198. The areas in question in this case were inactive when RCRA became effective and have been subject to CERCLA removal and remedial action since 1981.

2. Petitioners also argue (Pet. 9-14) that the court of appeals' decision in this case conflicts with decisions of other courts of appeals. Petitioners rely most heavily on *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994) (No. 93-786), which held that the State of Colorado could enforce its hazardous waste disposal laws at the Rocky Mountain Arsenal while that site was undergoing a CERCLA cleanup. The United States unsuccessfully petitioned for a writ of certiorari to address whether Colorado could dictate hazardous substance response activities at that site through state law. Although the *Colorado* decision conflicts in principle with the court of appeals' decision here, that inconsistency does not warrant this Court's review.

The United States petitioned for certiorari in *Colorado* primarily because the Tenth Circuit decided an important issue of federal-state relations in conflict with the Sixth Circuit's decision in *United States* v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409 (1991). U.S. Pet. at 16-18, No. 93-786. We noted that the Tenth Circuit's decision in *Colorado* was "at odds" with other appellate decisions, such as *Boarhead* and *Schalk*, *supra*, which had interpreted Section 113(h) to preclude judicial involvement while a CERCLA cleanup was underway. U.S. Pet. at 18, No. 93-786. But we explained that the clash between *Colorado* and *Akzo Coatings* presented the conflict of "greatest practical significance." *Ibid.*

The *Colorado* and *Akzo Coatings* decisions diverged on the question whether a State could bypass CERCLA's so-called "ARARs" process and apply its environmental standards independently of

CERCLA. U.S. Pet. at 18-20, No. 93-786.[5] That important question is not presented here. Unlike Colorado, which refused to join in an Interagency Agreement at the Rocky Mountain Arsenal, "the State of California is a full party to the [Interagency Agreement] and is satisfied that the [Interagency Agreement] is the appropriate mechanism to accomplish the environmental cleanup at [McClellan]." Pet. App. 191. That distinction renders this case far less worthy than *Colorado* of this Court's review.[6]

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[5] The "ARARs" process derives from Section 121(d) of CERCLA, which requires that a remedy achieve the level of cleanup specified pursuant to "applicable" or "relevant and appropriate" requirements under federal or state environmental law. 42 U.S.C 9621(d) (1988 & Supp. V 1993). The ARARs process gives the States an extensive role in the development, selection, and enforcement of the CERCLA remedy. See 42 U.S.C. 9621(d)-(f) (1988 & Supp. V 1993). To the extent practicable, "[f]und-financed removal actions under CERCLA section 104 and removal actions pursuant to CERCLA section 106 shall * * * attain [compliance with ARARs]." 40 C.F.R. 300.415(i).

[6] The *Colorado* decision also differs significantly from this case in important factual respects. The hazardous waste impoundment basin at issue in *Colorado* had received wastes as late as 1982, and the federal authorities had sought a RCRA permit for that basin four years before they had addressed the basin under CERCLA authority. The Tenth Circuit considered those facts significant. The court acknowledged that requiring the Army to obtain the state equivalent of a RCRA permit for the basin would appear to conflict with Section 121(e) of CERCLA, 42 U.S.C. 9621(e), which provides that no permits shall be required for on-site removal or remedial action. 990 F.2d at 1582. The court reasoned, however, that because the Army had already obtained a RCRA permit for the basin before CERCLA authority over that area had attached, Section 121(e) was not violated. See 990 F.2d at

Moreover, other courts of appeals have treated the *Colorado* decision's interpretation of Section 113(h) as an anomaly that is limited by the facts presented in that case. The Eighth Circuit noted that "[t]he Tenth Circuit limited its holding to an action brought by a state, and distinguished *Schalk* on the ground that *Schalk* was a citizen action," adding that a citizen plaintiff could not overcome "the plain wording of section 113(h)." *Arkansas Peace Center*, 999 F.2d at 1218. In this case, the court of appeals did not advert to *Colorado*, but similarly concluded that Section 113(h)'s language was "clear and unequivocal." Pet. App. 10, 11 n.4.[7]

Petitioners are wrong in contending (Pet. 10-12) that the court of appeals' decision conflicts with *Reardon* v. *United States*, 947 F.2d 1509 (1st Cir. 1991), and *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). The factual situations presented in those cases differ markedly from that here. In *Reardon*, the First Circuit addressed whether a CERCLA lien provision violated due process, 947 F.2d at 1514-1515, while in *Chateaugay*, the Second Circuit addressed whether certain CERCLA response costs were dis-

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1582. Here, the sites in question had ceased receiving waste before RCRA became effective. See also note 4, *supra*.

[7] Petitioners cite (Pet. 13) language from *Colorado*, 990 F.2d at 1577, indicating that the Tenth Circuit would not reach a different outcome in a citizen suit. But that dictum was not necessary to the court's holding. Colorado acted pursuant to its own state statutes, and the Tenth Circuit expressly declined to decide whether the State could enforce its claims under the RCRA citizen suit provision. 990 F.2d at 1578. Cf. *Metropolitan Stevedore Co.* v. *Rambo*, No. 94-820 (June 12, 1995), slip op. 9 ("Breath spent repeating dicta does not infuse it with life.").

chargeable in bankruptcy, 944 F.2d at 1005-1006. Neither of those legal claims amounted to a challenge to any particular removal or remedial action at a CERCLA site. Here, by contrast, petitioners seek relief that "would clearly interfere with the [CERCLA] cleanup." Pet. App. 15, 194.

As petitioners acknowledge (Pet. 9), the court of appeals' decision here is consistent with the decisions of other courts of appeals that have addressed the issue. In this case, as in those cases, the court of appeals determined that Section 113(h) barred environmental challenges that would interfere with an ongoing CERCLA cleanup. Compare Pet. App. 14-17 with *Arkansas Peace Center*, 999 F.2d at 1216-1218 (challenge under RCRA barred by Section 113(h)); *North Shore Gas*, 930 F.2d at 1244 (challenge under RCRA and the National Environmental Policy Act (NEPA) barred by Section 113(h)); *Boarhead Corp.*, 923 F.2d at 1018-1023 (challenge under the National Historic Preservation Act barred by Section 113(h)); *Schalk*, 900 F.2d at 1095-1097 (challenge under NEPA barred by Section 113(h)). The petition in this case, like similar petitions in prior cases, does not present a question warranting this Court's review. See *Arkansas Peace Center* v. *Arkansas Dep't of Pollution Control & Ecology*, cert. denied, 114 S. Ct. 1397 (1994); *Frey* v. *Reilly*, cert. denied, 498 U.S. 981 (1990).

3. Petitioners also dispute (Pet. 27-30) the court of appeals' specific determination that their CWA and RCRA challenges would interfere with the CERCLA cleanup. The court of appeals carefully examined the facts of this particular case and concluded (like the district court) that petitioners "seek[] to improve on the CERCLA cleanup as embodied in the Interagency

Agreement" and that their claims "would clearly interfere with" and "slow" the ongoing response actions at McClellan's inactive waste sites. Pet. App. 14-18. The court of appeals and the district court agreed that petitioners' claims are aimed at altering the CERCLA cleanup and, therefore, are the precise type of "challenges" that are deferred by Section 113(h) until the cleanup is completed. Petitioners disagree with that finding, but there is no reason for this Court to review petitioners' case-specific, factual disagreements with concurrent determinations reached by two lower courts. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

4. Finally, we note that the substance of petitioners' CWA and RCRA claims is insubstantial. The district court correctly found that the permit and notice requirements of those statutes did not apply to the hazardous waste sites that were the subject of the court of appeals' dismissal order. The district court concluded that petitioners' RCRA claims are not meritorious because that statute does not apply to McClellan sites that were abandoned before RCRA permit and notice requirements became effective. See Pet. App. 86-93. The court concluded that petitioners' CWA claims are inapposite because the relevant provisions do not apply to the leaching of contaminants into groundwater under McClellan in the circumstances presented here. *Id.* at 93-98, 156-165. Petitioners have provided no reason to doubt those conclusions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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